STATE OF MICHIGAN

COURT OF APPEALS

MARY ENGEL,

Plaintiff/Counter-Defendant-Appellant,

and

LAWRENCE S. ENGEL,

Third-Party Defendant-Appellant,

v

RONALD E. DAVID,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellee,

and

ROBERT VERBURG,

Defendant.

UNPUBLISHED
June 1, 2006

Nos. 264916; 265724
Kent Circuit Court
LC No. 04-010547-CK

Before: Meter, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff Mary Engel and third-party defendant Lawrence Engel (the Engels) appeal as of right a final order of summary disposition dismissing plaintiff's claim for defamation of title and permitting appellee Ronald David to recover on an outstanding promissory note. Plaintiff also appeals the trial court's award of costs and attorney fees to David. In each instance, we affirm.

Pursuant to a settlement agreement arising from unrelated litigation, the Engels were permitted to purchase approximately 39 acres of property for $380,000. The Engels borrowed the money for the purchase from the Joyce L. Rabbers Non Exempt Trust, which secured the resulting promissory note with a mortgage against the subject property (the Rabbers mortgage). Although held in escrow until closing of the property sale on May 8, 2000, the Rabbers mortgage, which was drafted by attorney Kenneth Walters and recorded on July 18, 2001, was executed by the Engels and notarized on February 17, 2000.

Walters had represented the Engels in the litigation to acquire the property, and the Engels agreed to pay Walters $50,000 to cover all outstanding attorney fees. As security for this promise, Walters drafted another note and mortgage against the subject property (the Walters mortgage), both of which the Engels signed and executed in conjunction with the May 8, 2000 closing. Walters recorded his mortgage on August 18, 2000, some eleven months before recordation of the Rabbers mortgage.

In November 2002, Walters assigned his note and mortgage to David. In February of the following year, the trustees of the Joyce L. Rabbers Non Exempt Trust assigned the Rabbers note and mortgage to David as well. The Engels were in default on both mortgages, and David foreclosed on the Rabbers mortgage in March 2003. David thereafter acquired the deed to the subject property at a sheriff's sale in April 2003. Following expiration of the period for redemption, plaintiff filed the instant suit seeking damages and to invalidate the foreclosure sale. David responded with a counterclaim and third-party action to recover against the Walters note.

On appeal, the Engels assert that the trial court erred in concluding that although filed second in time, the Rabbers mortgage had priority over the Walters mortgage.[1] We disagree. As found by the trial court, although the Engels are correct that a first-recorded encumbrance generally takes priority over subsequently recorded instruments, the order of recording is irrelevant in this case because Walters had notice of the preexisting rights of the Rabbers trust.[2]

A trial court's ruling on a motion for summary disposition is reviewed by this Court de novo. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). As questions of law, this Court also reviews de novo issues involving statutory interpretation and statutory construction. *Michigan Muni Liability & Prop Pool v Muskegon Co Bd of Co Rd Comm'rs*, 235 Mich App 183, 189; 597 NW2d 187 (1999); *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995).

MCL 565.29 provides, in relevant part, that "[e]very conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent *purchaser in good faith* and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded." (Emphasis added).

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[1] The Engels' theory of the case is that the priority of the mortgages will determine whether David correctly calculated the amount the Engels were required to pay to redeem the property from foreclosure, which, in turn, will dictate the validity of the foreclosure sale itself. We express no opinion as to the validity of this theory, and address only the question raised by the Engels on appeal, i.e., whether the trial court correctly determined the priorities of the mortgages at issue.

[2] The Engels assert that, although the dates and notary signatures on the respective mortgages indicate that the Rabbers mortgage was executed three months before the Walters mortgage, the Walters and Rabbers mortgages should be deemed to have both been executed on the day they received title to the property. However, the Engels provide no legal authority to support this assertion, and we will not "search for authority either to sustain or reject [their] position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

The clear import of this statute, when read in conjunction with MCL 565.25(4), "is that the first instrument concerning real estate to be recorded takes priority over later-recorded instruments of whatever sort." *Graves v American Acceptance Mortgage Corp*, 467 Mich 308, 312; 652 NW2d 221 (2002), vacated on other grounds, 467 Mich 1231 (2003).[3] However, it is well settled that if a mortgagee has notice of a prior unrecorded mortgage on property before he executes and records his mortgage on the same property, he is not a "purchaser in good faith" under MCL 565.29. See *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992). Indeed, our Supreme Court has long held that a mortgage executed before, but recorded after, a subsequently executed mortgage has priority over the subsequent mortgage if the creator of the later mortgage knew of the existence of the prior unrecorded mortgage. *Matosh v Metro Trust Co*, 262 Mich 201, 202-203; 247 NW 156 (1933).

Similar to the circumstances in *Matosh*, *supra*, though the Walters mortgage was recorded before the Rabbers mortgage, Walters was not a "purchaser in good faith" pursuant to MCL 565.29. It is not disputed that Walters drafted the Rabbers mortgage, and later, his own mortgage. Also, Walters stated at his deposition that he knew the Rabbers mortgage existed and had been executed at the time his own mortgage was executed by the Engels, and that he intended the Rabbers mortgage to take priority over his. Because the evidence clearly demonstrates that Walters had actual knowledge of the Rabbers mortgage at the time he took his mortgage, Walters was not a "purchaser in good faith" and his mortgage, therefore, does not take priority over the Rabbers mortgage despite having been first recorded.

Furthermore, that David was assigned the Walters mortgage does not change this result. In *Matosh*, our Supreme Court addressed the effect the assignment of a mortgage executed after, but recorded before, another mortgage by a mortgagee who had knowledge of the previous mortgage would have on the relative priority of the two mortgages. There, the plaintiff received but did not record, a mortgage. An individual by the name of Johanna Janesick thereafter received and recorded another mortgage, knowing that the plaintiff had previously received a mortgage against the property. The plaintiff then recorded his mortgage and, afterward, Janesick assigned her mortgage to third parties. Our Supreme Court noted:

> When the assignment of the Janesick mortgage was made, both the mortgages had been recorded, and it appeared of record that plaintiffs' mortgage was prior in point of time by ten days. The assignees are bound by the notice so afforded by the record. . . . The assignees are charged with the notice of record, and cannot be held to be subsequent transferees without notice.
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> "The purchaser of a mortgage is held bound by such notice as the registry afforded of another mortgage of the same date, but subsequently recorded, of

[3] MCL 565.25(4) provides that recorded liens, rights, and interests in property take priority over subsequent owners and encumbrances.

> which his vendor had actual knowledge." [*Matosh*, *supra* at 203, quoting *VanAken v Gleason*, 34 Mich 477 (1876).]

Thus, the *Matosh* Court concluded, because both mortgages had been recorded at the time of assignment, the assignees of the Janesick mortgage had sufficient notice of the plaintiff's mortgage and, as a result, the plaintiff's mortgage retained priority over the Janesick mortgage as against the assignees. *Id.*

Here, Walters assigned his mortgage interest in the property to David in November 2003, well after both mortgages were recorded. Under *Matosh*, the Walters mortgage is thus subordinate to the Rabbers mortgage, even after the assignment of the Walters mortgage to David. Both mortgages had been recorded at the time of the assignment, Walters had actual knowledge of the Rabbers mortgage when he executed his mortgage, and the mortgages themselves indicated the Rabbers mortgage had been executed before the Walters mortgage. As found by the *Matosh* Court, these factors render the Walters mortgage subordinate to the Rabbers mortgage, even after Walters assigned the mortgage to David. See also *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004) (a mortgage assignee has the same rights and is subject to the same defenses as the original mortgagee).

Next, plaintiff maintains that the trial court erred in ordering that she pay, pursuant to the offer of judgment rule of MCR 2.405, the attorney fees incurred by David in this action. Specifically, plaintiff argues that the court erred in rejecting her claim that the "interest of justice" exception provided for under MCR 2.405(D)(3) should be applied to deny David's request for attorney fees. Again, we disagree.

> This Court has stated that
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> "'absent unusual circumstances,' the 'interest of justice' does not preclude an award of attorney fees under MCR 2.405. . . .
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> The better position is that a grant of fees under MCR 2.405 should be the rule rather than the exception. To conclude otherwise would be to expand the 'interest of justice' exception to the point where it would render the rule ineffective." [*Derderian v Genesys Health Care Sys*, 263 Mich App 364, 390-391; 689 NW2d 145 (2004), quoting *Luidens v 63rd Dist Court*, 219 Mich App 24, 32; 555 NW2d 709 (1996)].

"Factors such as the reasonableness of the offeree's refusal of the offer, the party's ability to pay, and the fact that the claim was not frivolous 'are too common' to constitute the unusual circumstances encompassed by the 'interest of justice' exception." *Derderian*, *supra* at 391, quoting *Luidens*, *supra* at 34-35. However, if an offer is made out of "gamesmanship . . ., rather than a sincere effort at negotiation," or when litigation of the case affects the public interest, the exception may be applicable. *Derderian*, *supra*.

Here, in declining to apply the interest of justice exception, the trial court expressly rejected plaintiff's claim that defendant's offer of judgment at the outset of plaintiff's suit was designed simply to ensure an award of costs and fees should plaintiff's claims be dismissed, and thus amounted to mere "gamesmanship." A trial court's decision whether to apply the interest of

justice exception provided for under MCR 2.405(D)(3) is reviewed for an abuse of discretion. See *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 472, 476-477 624 NW2d 427 (2000). Given the strength of defendant's counterclaim and defense to plaintiff's suit, and the absence of any question of public interest, we do not conclude the trial court abused its discretion in declining to apply the interest of justice exception.

Affirmed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Jane E. Markey